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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 445

IN THE MATTER OF GEORGE R. JOSLYN, BANKRUPT.

BENEVOLENT AND PROTECTIVE ORDER OF ELKS OF THE UNITED STATES OF AMERICA,
Petitioner,

vs.

GEORGE R. JOSLYN, ET AL.,
Respondents.

BRIEF OF ARMIN F. HILLMER IN OPPOSITION TO PETITION FOR CERTIORARI.

KARL EDWIN SEYFARTH,
Counsel for Respondent,
Armin F. Hillmer.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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BRIEF OF ARMIN F. HILLMER IN OPPOSITION TO PETITION FOR CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition correctly states that the opinions of the lower courts are reported in 198 F. (2d) 673 and 102 F. Supp. 521. They are also to be found in the Transcript of Record at pages 422-27, 511-12 and 365-71. Accuracy, however, requires that petitioner's Summary Statement of Matters Involved be corrected and supplemented in certain respects.

Statement—Corrections and Additions.

Petitioner claims to be "a large creditor in the bankruptcy proceeding" (Pet. 3).

The fact is that petitioner was a depositor in the Chicago Bank of Commerce, an Illinois bank which failed in 1932 (R. 375, 382), and, under Illinois law, had a claim against the stockholders of said bank, which included George R. Joslyn (R. 423). The liability of said stockholder was subsequently satisfied and released in the manner hereinafter described, and petitioner's present claim to being a creditor of the bankrupt is based upon the erroneous assumption that said satisfaction and release were void and of no legal effect. This error is the premise upon which petitioner predicates its right to review herein.

At the time the Chicago Bank of Commerce failed, the Illinois law made stockholders in state banks liable to creditors thereof in an amount equal to the par value of shares held by said stockholders (Ill. Constitution Art. XI, § 6; Ill. Rev. Stat. Chap. 16½, § 6). The par value of stock issued in the name of George R. Joslyn was $57,100 (R. 365-6, 67-8), and petitioner now admits that "there is no issue respecting the principal amount of that liability" (Pet. 4).

On June 25, 1932, long prior to the bankruptcy proceeding herein, this respondent, Armin F. Hillmer, and other creditors of the Chicago Bank of Commerce filed a class suit in the Superior Court of Cook County, Illinois, on behalf of all creditors, which included petitioner herein (R. 423, 425), against the stockholders to enforce the constitutional and statutory liability of said stockholders to the creditors of said bank (R. 372-3, 94-5). George R. Joslyn was made a party to said suit and filed his answer therein (R. 373).

On February 27, 1936, George R. Joslyn filed his petition in bankruptcy herein (R. 2).

Thereafter, on July 12, 1951, Marcellus L. Joslyn, the father of the bankrupt, who was also a defendant in the action to enforce stockholders' liability, petitioned the Superior Court of Cook County, Illinois, to adjudicate the liability of the bankrupt and to permit said petitioner to pay the same (R. 245-6). Thereafter, the state court entered an order fixing the liability at $57,100, accepted said sum from the father of the bankrupt, and satisfied the liability of George R. Joslyn to the creditors of the Chicago Bank of Commerce (R. 348-53). In due course the receiver in said cause issued a release to the bankrupt (R. 247-8).

The District Court, in which the bankruptcy was pending, was of the opinion that "the satisfaction of the bankrupt's stockholders' liability by a payment of the sum of $57,100 by Marcellus L. Joslyn and the disclaimer aforementioned by the other two creditors leave this court with a bankruptcy case without creditors or claimants except for fees, costs and expenses arising out of the proceedings herein" (R. 380, 368, 383). Accordingly, on November 8, 1951, the District Court entered a decree modifying and vacating certain orders, directing the dismissal of litigation instituted by the trustee, directing the bankrupt to pay certain costs and expenses, and reserving jurisdiction of the bankrupt for the purpose of adjudicating and enforcing claims for fees, costs and expenses in the bankruptcy proceeding (R. 384-6, 3). Upon appeal, the United States Court of Appeals for the Seventh Circuit affirmed this action of the trial court (R. 422-6, 511-12).

Question Presented.

The question thus presented is whether the state court had *jurisdiction* in the stockholders' liability suit to adjudicate and satisfy the liability of George R. Joslyn as a stockholder of the Chicago Bank of Commerce. If the Illinois court had jurisdiction, then the liability of the bankrupt has been satisfied by payment, and petitioner herein—as well as all other depositors of the Chicago Bank of Commerce—has ceased to be a creditor of the bankrupt.

Numerous other questions stated by petitioner and sought to be injected as issues herein (Pet. 9-10), are either nonexistent or irrelevant so far as this respondent is concerned.

No Grounds Exist for Allowance of Certiorari.

Petitioner urges two reasons for allowing the writ herein: (1) that the court below decided federal questions in conflict with applicable decisions of this court, and (2) that the court below has sanctioned such a departure from accepted and usual bankruptcy procedure as to require supervision thereof by this court (Pet. 10). Neither of these contentions is supported by the record herein.

ARGUMENT.

In this case the petitioner is seeking to keep alive a bankruptcy proceeding in which the bankrupt is *solvent* and in which there are no creditors or claimants. Both lower courts have held that the bankruptcy proceeding should be terminated after payment of fees, costs and expenses of litigation.

This court has repeatedly declared that the issuance of writs of certiorari "is a jurisdiction to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision." *Hamilton Brown Shoe Co.* v. *Wolf*, 240 U. S. 251, 258. The record herein does not present a case of such gravity, importance or conflict of decisions as to warrant this court assuming jurisdiction.

I.

NO CONFLICT OF DECISION IS INVOLVED.

Although petitioner asserts that the "Court of Appeals has in this cause decided federal questions in a way in conflict with applicable decisions of the Supreme Court" (Pet. 10), no decisions of other Courts of Appeal or of this court are cited or referred to which conflict with the action of the lower courts herein. The reason is obvious. There are no conflicting decisions and petitioner is in reality seeking a review of the decisions below on the sole ground that they are erroneous. This is not a proper ground for review by certiorari. *Magnum Import Co.* v. *De Spoturno Coty*, 262 U. S. 159, 163; *General Talk. Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175, 177-9.

The foregoing cases should dispose of this matter, but because petitioner has argued at length the *merits* of the action of the lower courts, respondent will consider the same more fully than would otherwise be warranted. In doing so, it is well to remember that the argument of petitioner constitutes a collateral attack on the prior judgment of the state court adjudicating and satisfying the liability of George R. Joslyn as a stockholder of the Chicago Bank of Commerce.

It is elementary that petitioner could not prevail in a review of the *merits* unless the action of the state court was void *ab initio* for lack of jurisdiction. *Cooper* v. *Reynolds*, 77 U. S. 308, 316; *Holley* v. *General American Life Ins. Co.*, 101 F. (2d) 172, 174 (C. C. A. 8), cert. denied 307 U. S. 615; *Higginson* v. *Schoeneman*, 190 F. (2d) 32, 33-4 (C. C. A. D. C.). Accordingly, the sole question on the merits is whether the Superior Court of Cook County, Illinois, had jurisdiction in the stockholders' liability proceedings to determine and satisfy the liability of George R. Joslyn as a stockholder of the Chicago Bank of Commerce. To state this question is to suggest the answer.

A. The state court acquired and retained prior jurisdiction over George R. Joslyn and the subject matter of his stockholder's liability.

It has long been established, by statutes and court decisions in Illinois, that the proper method of enforcing the liability of stockholders in Illinois banks is by a class suit for the benefit of all creditors of the bank—of the type instituted by the respondent in the Superior Court of Cook County. *Banking Act of Illinois* (Ill. Rev. Stat. Chap. 16½, § 11); *Heine* v. *Degen*, 362 Ill. 357, 365-6; *Babka Plastering Co.* v. *City State Bank*, 264 Ill. App. 142, 151-3; *Elkin* v. *Diversey Tr. & Svgs. Bank*, 363 Ill. 160, 164-5; *RFC* v.

Central Republic Trust Co., 11 F. Supp. 976, 983-4 (D. C. Ill.).

On July 28, 1932—more than four years prior to the bankruptcy herein—the Superior Court of Cook County proceeded to protect its jurisdiction by appointing a receiver in the Hillmer suit to receive stockholders' liabilities, and by enjoining all creditors from proceeding elsewhere to enforce the liability of the stockholders of said bank (R. 183-6). Said injunction is still in force (R. 350, 95, 97-8).

Both the state court and the trial court herein have found as a *fact* that the Superior Court of Cook County obtained and retained jurisdiction to determine the stockholder's liability of George R. Joslyn (R. 348-53, 375-6). These findings concerning the jurisdiction of the state court are controlling and determinative of the issues herein.

B. The bankruptcy of George R. Joslyn did not destroy the power of the state court to proceed to judgment in the stockholders' liability suit.

The Bankruptcy Act clearly recognizes the *continued* existence of the power of a state court to act during the pendency of bankruptcy proceedings instituted by a defendant. Thus, Section 11(b) of the Act (11 U. S. C. A. § 29) makes provision for a bankruptcy trustee to defend pending litigation—in which event the trustee and estate are bound by the judgment of the state court. *In re McNulty*, 13 F. (2d) 754, 755 (C. C. A. 9).

Section 63(a)(5) (11 U. S. C. A. § 103) authorizes the allowance of claims in bankruptcy on judgments entered in state courts *after* the filing of a bankruptcy petition—which judgments cannot be questioned in the bankruptcy proceedings. *U. S.* v. *Paddock*, 180 F. (2d) 121, 123-4 (C. C. A. 5); *In re Anton*, 11 F. Supp. 345, 347 (D. C. Minn.).

Similarly, and particularly pertinent herein, Section

63(b) (11 U. S. C. A. § 103) expressly authorizes the liquidation of claims against the bankrupt in such manner as the bankruptcy court shall direct. This statutory provision definitely authorizes the liquidation of claims in state court proceedings. *In re Martin,* 228 Fed. 184 (C. C. A. 2); *In re Buchan's Soap Corp.,* 169 Fed. 1017 (D. C. N. Y.).

Except in special situations like agricultural bankruptcies, in which the Act expressly prohibits proceedings in state courts, federal courts have uniformly held that bankruptcy proceedings do not automatically divest a state court of power to act in pending litigation, and that the *jurisdiction* of the state court is not thereby "terminated," "divested," "abated" or "frozen." *Connell* v. *Walker,* 291 U. S. 1, 5-6; *Norton* v. *Switzer,* 93 U. S. 355, 362; *U. S.* v. *Paddock,* 180 F. (2d) 121, 124 (C. C. A. 5); *In re Tinkoff,* 141 F. (2d) 731, 733 (C. C. A. 7). As concisely stated by this court in *Connell* v. *Walker,* 291 U. S. 1 at page 5:

> "Bankruptcy proceedings do not, merely by virtue of their maintenance, terminate an action already pending in a non-bankruptcy court, to which the bankrupt is a party."

Decisive of the question here under consideration are the decisions of both this court and lower federal courts which squarely hold that a state court which acquires jurisdiction before the bankruptcy of a defendant therein, retains such jurisdiction, is not deprived thereof by the bankruptcy proceedings, and has power to render a valid and binding judgment *in personam* against the defendant. *Dimock* v. *Revere Copper Co.,* 117 U. S. 559, 564; *In re Innis,* 140 F. (2d) 479, 480-1 (C. C. A. 7), *cert. denied* 322 U. S. 736; *Norton* v. *Switzer,* 93 U. S. 355, 362, 364; *In re Anton,* 11 F. Supp. 345, 346-7 (D. C. Minn.).

In an identical situation in the *Dimock* case, this court said:

> "The Superior Court of Massachusetts had jurisdic-

tion of the suit of the Copper Company against Dimock, both as regards the subject matter and the parties. This jurisdiction was rendered complete by service of process and by the appearance of the defendant. All this was before the beginning of the bankruptcy proceeding. Nothing was done to oust this jurisdiction, and the case accordingly proceeded in due order to the rendition of the judgment which is the foundation of this action. It is not argued that this judgment was void, or that the court was ousted of its jurisdiction by anything done in the bankruptcy court. **No such argument could be sustained if it were made.**" (p. 564.) (Boldface type ours.)

The *Dimock* case was followed by the Court of Appeals for the Seventh Circuit in *In re Innis*, 140 F. (2d) 479, in which the court said:

"As announced in *Dimock* v. *Revere Copper Co.*, 117 U. S. 559, 6 S. Ct. 855, 29 L. Ed. 994, the state court had acquired jurisdiction of the parties and of the subject matter. It was 'competent to administer full justice' and was proceeding according to the law which governed such suits. It was not compelled to take judicial notice of the proceeding in bankruptcy in another court, however seriously that proceeding might affect the rights of the parties to the suit already pending. It was the duty of the state court to proceed to judgment between the parties unless, by some proper pleading, it was informed of the changed relation of any of the parties to the suit's subject matter." (p. 480)

Although petitioner was familiar with the proceedings in the state court, it did nothing to bring the bankruptcy proceeding to the attention of the state court until *after* the satisfaction and release of the liability of George R. Joslyn. Petitioner should not now be heard to complain about this action of the state court.

Subsequent approval by the District Court herein of the action of the state court was tantamount to a direction by the bankruptcy court that the stockholders' liability should

be liquidated in the state court, pursuant to express authorization in the Bankruptcy Act. This action by the federal court conformed to all relevant adjudicated cases and in no way conflicted therewith.

The cases relied on by petitioner in point II are irrelevant and need not be considered herein because they involved proceedings relating to real property (*Isaacs* v. *Hobbs Tie & Timber Co.*), or to enforce liens (*U. S. Fidelity Co.* v. *Bray*), or agricultural bankruptcies, in which the Act specifically prohibits state court proceedings (*Littleton* v. *Kincaid*), or factual situations unlike the situation presented by this record and which are governed by different rules of law (*Pepper* v. *Litton, New York* v. *Saper, Johnson* v. *Norris, Sturges* v. *Crowninshield, International Shoe Co.* v. *Pinkus*).

Since the facts in this case are unlike those involved in any of the cases cited by petitioner, the decision of the lower courts herein does not conflict with said adjudications or furnish the basis for allowing certiorari herein.

II.

THIS RECORD DOES NOT PRESENT A SITUATION OF SUCH GRAVITY OR IMPORTANCE AS TO WARRANT REVIEW BY CERTIORARI.

In an effort to induce the court to review this case, petitioner asserts that the Court of Appeals "has so far sanctioned such a departure by the District Court from the accepted and usual course of proceedings in bankruptcy as to call for an exercise of the Supreme Court's power of supervision" (Pet. 10). The claimed departure consists of (1) the refusal of the bankruptcy court to go through unnecessary motions in administering the assets of a *solvent* bankrupt and (2) the approval of the bankruptcy court of

the action of the state court satisfying the liability of George R. Joslyn as a stockholder of the Chicago Bank of Commerce.

A. Practice and procedure in bankruptcy relating to solvent estates without creditors is not of general importance.

Respondent believes that the factual situation presented by this record occurs so infrequently—and is so unique—as to take this case out of any classification of general importance. As pointed out by the Court of Appeals, "the controversy on the present appeals presents the *unusual situation* of an adjudicated bankrupt, now fully *solvent* * * *" (R. 424). As described by the trial court, "*this is a bankruptcy case without creditors or claimants*" (R. 368). How unlike this situation are typical bankruptcies involving hopelessly insolvent estates with large numbers of unpaid claimants. The issues herein are not of general importance for nothing which could be decided on a review of the present case would have any bearing in the usual and normal bankruptcy proceeding.

B. No interest was collectible on the stockholder's liability of George R. Joslyn and no question involving interest warrants review by certiorari herein.

Throughout its petition and brief, petitioner asserts that the stockholder's liability of George R. Joslyn bore interest and that the satisfaction of said liability by payment of $57,100 deprived petitioner of interest on its claim in the bankruptcy court.

This argument ignores the basic fact that petitioner's claim against the bankrupt is created by and dependent upon statutory law in Illinois. Thus, at common law, a bank depositor had no claim against the stockholders of the

bank. Petitioner's claim against the bankrupt as a bank stockholder was created and exists only because of constitutional and statutory provisions (*Golden* v. *Cervenka,* 278 Ill. 409, 418) which prescribe the par value of stock as the *maximum* limit of such liability. *Sanders* v. *Merchants State Bank of Centralia,* 349 Ill. 547, 556-7; *Heine* v. *Degen,* 362 Ill. 357, 371-2.

Illinois courts have uniformly held that interest is not a part of stockholders' liability and have consistently declined to assess interest prior to decree. *Hillmer* v. *Block,* 315 Ill. App. 134; *Munger* v. *Jacobson,* 99 Ill. 349, 354; *Lewis* v. *West Side Tr. & Svgs. Bank,* 376 Ill. 23, 45-7; *Cohen* v. *North Ave. State Bank,* 291 Ill. App. 558, 569-70.

So also, interest is of statutory origin in Illinois (Ill. Rev. Stat. 1951, Chap. 74, § 2) and federal courts, including bankruptcy courts, are bound by the Illinois decisions construing the interest statute. *Huddleston* v. *Dwyer,* 322 U. S. 232, 236-7; *Illinois Surety Co.* v. *John Davis Co.,* 244 U. S. 376, 381; *RFC* v. *Goldberg,* 143 F. (2d) 752, 759-61 (C. C. A. 7).

Illinois decisions hold "that there is no liability for interest on stockholders' liability" in banks organized under Illinois law. *Garvy* v. *Wilder,* 121 F. (2d) 714, 716 (C. C. A. 7); *Hillmer* v. *Block,* 315 Ill. App. 134; *Munger* v. *Jacobson,* 99 Ill. 349, 354; *Lewis* v. *West Side Tr. & Svgs. Bank,* 376 Ill. 23, 45-7; *Cohen* v. *North Ave. State Bank,* 291 Ill. App. 558, 569-70.

The argument that petitioner has been deprived of interest on his claim against a solvent bankrupt overlooks the fact that after payment of the stockholder's liability of George R. Joslyn in the state court petitioner has no claim in the bankruptcy court upon which interest could accrue. It certainly does not appear that any question relating to interest is of such gravity as to warrant review by certiorari herein.

CONCLUSION.

This case was properly decided by the lower courts and no adequate ground for certiorari has been presented here. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Armin F. Hillmer.